83-842

NO. 83-

in the Supreme Court of the United States

October Term, 1983

GERALD J. RUSSELL,

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

JOEL HIRSCHHORN, P.A.
By: Joel Hirschhorn, Esq.
Counsel for Petitioner
Gerald J. Russell
2766 Douglas Road
Miami, Florida 33133
Telephone: (305) 445-5320

QUESTION PRESENTED

I.

WHETHER PETITIONER WAS DENIED A FAIR AND IMPARTIAL TRIAL AND DUE PROCESS OF LAW IN HIS TRIAL FOR FIRST DEGREE MURDER BY THE PROSECUTOR'S "REBUTTAL" CLOSING ARGUMENT, DURING WHICH THE PROSECUTOR RAISED, FOR THE FIRST TIME, AN ENTIRELY NEW FELONY-MURDER THEORY OF PROSECUTION, WHICH WAS NEITHER PLED NOR REASONABLY SUPPORTED BY THE EVIDENCE, NOR "INVITED" BY DEFENSE COUNSEL'S CLOSING ARGUMENT, AND WHEN PETITIONER'S REQUEST FOR SURREBUTTAL ARGUMENT WAS DENIED.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

CITATION TO THE OPINION BELOW

The decision of the District Court of Appeal of Florida, Third District, is reported at 436 So.2d 1016 (Fla. 3rd DCA 1983). (A.1-2).[1]

JURISDICTION

The Judgment of the District Court of Appeal of Florida, Third District, was entered on August 9, 1983, affirming *Per Curiam*, without opinion, Petitioner's conviction. (A.1-2). The District Court of Appeal denied a timely Petition for Rehearing on September 21, 1983. (A3).[2] The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The case *sub judice* involves Petitioner's rights to a fair and impartial trial and to due process of law as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. U.S. Const., Amend. VI and XIV, §1. (A. 4).

---

[1]The symbol "A." refers to the Appendix attached hereto.

[2]Review by the Supreme Court of Florida is precluded by Florida Rule of Appellate Procedure 9.030(a)(2)(A) which bars review of *Per Curiam* affirmed decisions of the District Courts of Appeal.

STATEMENT OF THE CASE

On March 17, 1982, Petitioner was indicted for the first degree murder of Lance Anderson and the attempted first degree murder of Frank Armstrong. (A. 6-7; R. 4-4A).[3] Petitioner entered his plea of not guilty to the charges. (R. 19). Immediately prior to trial, Respondent elected not to seek the death penalty. (Tr. 5).[4]

Petitioner's jury trial commenced on July 19, 1982 and concluded on July 23, 1982. Following its deliberations, the jury found Petitioner guilty of first degree murder as charged in Count I and not guilty of attempted murder as. charged in Count II. (Tr. 1395).[5]

The facts of this case reflect a homicide unfortunately resulting from a classic love triangle. Petitioner, a veteran Eastern Airlines pilot, met Kathleen Anderson, a flight attendant for Eastern Airlines and the wife of the victim, approximately four years prior to the death of her husband, Lance Anderson, who was also a pilot for Eastern Airlines. After working several flights together, Petitioner and Mrs. Anderson became romantically involved. (Tr. 1085-1090).

As time went by, Petitioner's relationship with Mrs. Anderson became closer and more intimate. Their

---

[3]The symbol "R." refers to the Record on Appeal.

[4]The symbol "Tr." refers to the trial transcript.

[5]The trial transcript inaccurately reflects a verdict of guilty as to Count II. (Tr. 1395). However, the Clerk's Minutes (R.17) and the sentencing transcript (Tr. 1413-1414) remedy the initial inaccuracy of the transcript. See, also, Tr. 1399.

respective children began to become involved in the relationship. Petitioner moved out of the marital home and was divorced from his wife in March of 1980. (Tr. 1093-1096, 1103-1104). Shortly thereafter, the victim and Mrs. Anderson separated, with the victim leaving their marital home. (Tr. 372-373, 1119). Petitioner and his daughter continued spending more and more time with Mrs. Anderson and her daughter. (Tr. 1119-1120).

On his own initiative, in December of 1980, the victim moved back into his marital home. The relationship between Petitioner and Mrs. Anderson continued. The victim learned of this relationship. Although Petitioner and Mrs. Anderson had discussed marriage, she was waiting for the "right" time to leave, in view of her concerns about the effect that leaving her husband would have on her future financial security. (Tr. 1120-1121, 1103-1104, 376, 1130-1131, 488). On several occasions during this period of time, Mrs. Anderson would examine the contents of her husband's briefcase which he left parked in his car while away. (Tr. 1132). On one such occasion, Mrs. Anderson removed her husband's gun from the glove compartment and gave it to Petitioner. (Tr. 1132). This is the gun that Petitioner used to shoot his lover's husband. (Tr. 1209).

At trial, there was disagreement respecting the continuing intensity of the romantic involvement between Petitioner and Mrs. Anderson. Mrs. Anderson testified that her romantic involvement with Petitioner ended by the summer of 1981. Petitioner testified that, while Mrs. Anderson rejected his requests that she leave her husband and marry him, their romantic involvement continued through February 24, 1982, the date of the shooting. (Tr. 379-382, 1135-1159). The record is clear

that the two continued to see each other frequently, up until the day of the shooting. The record is also clear that prior to and during the early part of 1982, Petitioner was drinking heavily. (Tr. 1213-1214).

On February 24, 1982, the day of the shooting, Mrs. Anderson arrived at Petitioner's townhouse in the late morning. (Tr. 454, 1158). When she arrived, Petitioner was drinking beer. (Tr. 453). According to Petitioner, they talked, made love, and stopped briefly at a friend's house before going out to lunch. (Tr. 1159-1160). Mrs. Anderson denied only that they made love. (Tr. 395-397, 464-465). After lunch, during which they shared a carafe of wine, Petitioner and Mrs. Anderson parted company. (Tr. 399, 455-456, 1160-1162).

Appellant's recollection of the remaining events of the day was very limited and sporadic. He recalled making arrangements to play in his weekly tennis game at 7 o'clock that evening and continuing to drink both going to and on the way home from the tennis game. (Tr. 1163-1169).

Mrs. Anderson testified that at about 9:00 P.M. that evening she received a call from Petitioner who told her that he did not play tennis well that night and his friends had given him a "hard time" about it. (Tr. 406). Petitioner did not remember this conversation. He remembered only walking through a screen door on his way to water plants, talking to his daughter, and getting ready for bed. (Tr. 1170-1171).

Later that evening, Petitioner shot and killed Lance Anderson on the front lawn of Anderson's home (which

was located a number of miles away from Petitioner's townhouse) when Anderson arrived home that evening accompanied by Frank Armstrong. Although the record is silent as to how Petitioner got to the Anderson home, the evidence established that he drove his pickup truck to a point somewhere near the house and then pedaled to the home on his daughter's bicycle, which was seen by the victim and Armstrong, in plain view, leaning against the front fence. (Tr. 323-324). The shooting took place with Petitioner, wearing a ski mask with eyeholes cut out, firing from a close range into the Anderson vehicle, with Anderson firing back at Petitioner. (Tr. 308-313, 328-332). Before succumbing, Anderson was able to shoot Petitioner in the stomach. Shortly after the shooting, Petitioner was found passed out behind the wheel of his truck, after having crashed into a light pole about a mile from the Anderson home. (Tr. 535, 547-548, 552).

A large box constructed by Appellant to act as a crude, homemade silencer was found on the lawn of the Anderson home near the scene of the shooting. (Tr. 565-566). Inside the cab of Petitioner's truck, the police found, among other things, a pair of handcuffs, rubber gloves, money wrappers, and the ski mask. The bicycle was found in the back of the truck. (Tr. 549-551).

The emergency room physician who treated Petitioner testified that his vomit exuded a clear odor of alcohol and that he could smell alcohol on Petitioner's breath. (Tr. 1072 -1077).

Although Florida's murder statute (Sec. 782.04 Florida Statutes) contains a provision for first degree

felony-murder (A. 4-5), Respondent procured an Indictment charging only first degree premeditated murder. (A. 6-7; R. 4-4A). Respondent conducted its case-in-chief on a straight "premeditation" theory. The motive, of course, was Mrs. Anderson's rejections of Petitioner's continual requests that she leave her husband and marry him. The Respondent's theory of classic premeditation is clearly reflected in the prosecutor's "initial" closing argument. (Tr. 1265-1298). The theory of the defense, as articulated during closing argument, was the negation of premeditation as a result of several factors, including Petitioner's alcoholism, as well as the inducements of Mrs. Anderson, which were successful as a result of Petitioner's "blind" love for her. (Tr. 1307-1346).[4]

After defense counsel's closing argument, without warning, and for the first time during his "rebuttal" closing argument, the prosecutor raised, for the jury's consideration, an entirely new felony-murder theory of prosecution, alleging that the murder really occurred in the course of a kidnapping:

> If he was planning to abduct him in the yard or kill him in the yard the way he did, he would not have left his bicycle in the yard and went through all these precautions, the changing of clothing, the ski mask—
>
> (A. 7; Tr. 1355).

---

[4]During closing argument, Petitioner's counsel described Mrs. Anderson as a modern-day "Jezebel". (Tr. 1326, 1345). See 1 *Kings* 21:5-16 (The New English Bible—Standard Edition).

Over objection, the prosecutor continued:

> He used the glove not to leave fingerprints or to get fibers on his hands.
>
> The handcuff for abducting Lance Anderson to get him from the house, to take him away from the house.

(A. 8; Tr. 1356).

Again, over objection of counsel, the argument continued:

> What is the purpose of the handcuffs that he had just bought because he just wanted—he had just happened to put them in the truck to abduct Lance Anderson away from the scene of his lover, Kathy Anderson, who would have never known, would have been waiting and waiting. So, the gloves wouldn't leave fingerprints. And the money wrappers to leave in Lance Anderson's car.
>
> * * * * *
>
> Before [Lance Anderson] gets out of the car he is abducted by a masked man and ordered back into the car and he is abducted and dumped somewhere, some canal. Handcuffed.

(A. 9, 10; Tr. 1357-1358).

On this new theory, and over the continuing objection of counsel, the prosecutor concluded:

> Why the money wrappers?
>
> To cover his tracks. You all heard testimony about the rich businessman, don't you love it? The money wrappers are in his vehicle where the body is. The motive is robbery, not love, robbery. He's gone. He's a free man. But—but, he got caught. He didn't have time to use the suppressor. He had time to get the mask and hold it down and that's about it.

(A. 11; Tr. 1358-1359).

The record is replete with Petitioner's vociferous objections to this improper rebuttal closing argument. (A. 7-11; Tr. 1355-58). At the conclusion of the prosecutor's argument, Petitioner moved for a mistrial, (A. 11; Tr. 1366-1367) for surrebuttal, (A. 12, Tr. 1367), and to strike the prosecutor's improper argument. (A. 13-15; Tr. 1370-1373). Petitioner's objections were overruled and his motion for mistrial was denied. (A. 12, 13, 15; Tr. 1367-1373). Petitioner's post-trial motion for new trial directed, *inter alia*, to the impropriety of the prosecutor's rebuttal closing argument, was likewise denied. (R. 205-206A).

In accordance with the requirements of the applicable Florida statute, the court sentenced Petitioner to life imprisonment with a minimum mandatory twenty-five year prison term prior to eligibility for parole. (Tr. 1413).

On August 9, 1983, the District Court of Appeal of Florida, Third District, affirmed *Per Curiam* and without

opinion Petitioner's conviction. (A. 1-2). A timely Petition for Rehearing was denied on September 21, 1983. (A. 3). The federal question for which review is sought herein was fully raised by Petitioner in his briefs and arguments to the District Court of Appeal, Third District.[7]

REASONS FOR GRANTING THE WRIT

The granting of this Petition for Writ of Certiorari will advance the administration of criminal justice by clarifying the proper application to all criminal defendants of the Sixth and Fourteenth Amendments' guarantees of a fair and impartial trial, free from prosecutorial misconduct, and establish much needed rules of law with respect to the permissible scope of State prosecutors' rebuttal closing arguments. Unless redressed, Petitioner will suffer irreparable, blatant violations of rights guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution. State court enforcement of the right to a fair and impartial trial ought to be consistent with this Court's decisions. In addition to the remedial nature of the relief sought herein, granting this Writ will enable this Court to offer much needed clarification and amplication of its prior decisions in the area of a defendant's right to a fair and impartial trial unimpeded by prosecutorial misconduct.

---

[7]Initial Brief of Appellant – Point One On Appeal; Reply Brief of Appellant – Point One On Appeal. Additionally, the matter was fully presented at oral argument, which occurred before the District Court of Appeal on July 22, 1983, and in the Motion for Rehearing.

1. PETITIONER WAS DENIED A FAIR AND IMPARTIAL TRIAL AND DUE PROCESS OF LAW BY THE PROSECUTOR'S "REBUTTAL" CLOSING ARGUMENT, DURING WHICH THE PROSECUTOR RAISED, FOR THE FIRST TIME, AN ENTIRELY NEW FELONY-MURDER THEORY OF PROSECUTION, WHICH WAS NEITHER PLED NOR REASONABLY SUPPORTED BY THE EVIDENCE, NOR "INVITED" BY DEFENSE COUNSEL'S CLOSING ARGUMENT, AND WHEN PETITIONER'S REQUEST FOR SURREBUTTAL ARGUMENT WAS DENIED.

Notwithstanding the prosecutor's thinly veiled assertions that he was merely responding to the closing arguments of defense counsel (A. 12; Tr. 1367-1369), the record in this case makes it abundantly clear that the prosecutor employed a "gotcha" strategy in securing a conviction in this case. Although a statutory vehicle existed, the prosecutor chose not to seek an indictment alleging felony-murder, or to even indict alleging felony-murder in the alternative. (R. 4-4A). The Respondent's case-in-chief was prosecuted along classic premeditation lines, with Petitioner's professed love for Mrs. Anderson being the motive. Not once in his initial closing argument (Tr. 1265-1298), did the prosecutor refer to a felony-murder theory. Instead, he waited until after defense counsel had exercised his only opportunity to speak to the jury when he launched this surprise attack! Petitioner was denied the opportunity to respond to the prosecutor's remarks, which were the last comments on the evidence to be heard by the jury.

This Court has long condemned arguments by prosecuting attorneys "[which contain] improper insinuations and assertions calculated to mislead [a] jury." *Berger v. United States*, 295 U.S. 78, 85 (1935). In *Berger*, this Court stated:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much

weight against the accused when they should properly carry none.

Id. at 88.

In *Viereck v. United States*, 318 U.S. 236 (1943), this Court applied the principles enunciated in *Berger* to a prosecutor's closing remarks to a jury.

As in *Viereck*, the prosecutor's comments *sub judice* were prejudicial to Petitioner by inviting speculation by the jury on a matter that was, up until the time of the prosecutor's rebuttal closing argument, a non-existent issue, to-wit: felony-murder. The prosecutor argued that Petitioner's conduct was part of a carefully conceived plan to abduct the victim in his own vehicle, make the motive appear to be robbery, and dump him in a canal. When the scheme immediately went awry, Petitioner shot the victim in the course of the abduction. (A. 7-11; Tr. 1355-1359). As carefully planned by the prosecutor, defense counsel was given no opportunity to rebut these assertions, even though the defense had been tailored to meet the clearly expressed prosecutorial theory which ran throughout Respondent's presentation of its case, and which totally failed to include the concept of felony-murder.

Although this Court has not addressed the precise issue of the permissible scope of a prosecutor's rebuttal closing argument, those Federal Courts which have considered the issue have generally acknowledged the rule prohibiting a prosecutor from developing new arguments in the rebuttal portion of his closing argument to the jury, and, instead, restricting the prosecutor to

refuting those arguments advanced by defense counsel. See, *Moore v. United States*, 344 F.2d 558 (D.C. Cir. 1965); *United States v. Lawson*, 483 F.2d 535 (1973) *cert. denied* 414 U.S. 1133 (1974); *cf. United States v. Yaughn*, 493 F.2d 441, 445 (5th Cir. 1974) (Rives, J. dissenting). Significantly, in *United States v. Gleason*, 616 F.2d 2 (2d Cir. 1979) *cert. denied* 444 U.S. 1082 (1980), the Second Circuit found the prosecutor's rebuttal closing argument to be improper, but declined to reverse because the trial judge had offered the defendants the opportunity to give surrebuttal argument (which they declined) to negate the possibility of prejudice. *Id.* at 26.

The failure of the trial court to allow Petitioner surrebuttal argument to respond to the prosecutor's felony-murder theory denied Petitioner due process of law in violation of the Fourteenth Amendment. In *Chambers v. Mississippi*, 410 U.S. 284 (1973), this Court held that: "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Id.* at 294. In *Chambers*, this Court held that Mississippi's literal application of its "voucher rule", and its rules pertaining to hearsay, had operated to deprive the defendant, under the facts of that case, to due process and to a fair trial. *Id.* at 302-303.

In the instant case, as in *Chambers*, by virtue of the prosecutor's rebuttal closing argument, Petitioner was denied ". . . the right to a fair opportunity to defend against the State's accusations." *Id.* at 294. Although not testimony or evidence, the prosecutor's remarks during his rebuttal closing argument constituted "eleventh-hour unfairness and surprise". *United States*

v. Gleason, 616 F.2d at 26. The timing of the prosecutor's remarks was obviously calculated to mislead the jury and secure a conviction by improper methods. *Berger v. United States*, 295 U.S. 78 (1935). The prosecutor's action clearly exceeded the bounds of propriety and went from a "hard blow" to a "foul [blow]". *Id.* at 88; *Viereck v. United States*, 318 U.S. 236 (1943). The prejudicial nature of the prosecutor's remarks was exacerbated by the fact that his comments went unanswered by Petitioner, uncensored by the trial court, and constituted the final argument heard by the jury. As in *Chambers v. Mississippi*, 410 U.S. 284 (1973), Petitioner was denied his right to a fair and impartial trial and to due process of law. *Cf. Walker v. Engle*, 703 F.2d 959 (6th Cir. 1983) *cert. denied* ____ U.S. ____, 34 Cr.L.4065 (10/31/83).

CONCLUSION

Petitioner respectfully urges this Court, for the reasons set forth above, to grant a Writ of Certiorari and to reverse the decision below.

Respectfully submitted,

JOEL HIRSCHHORN, P.A.
By: Joel Hirschhorn, Esq.
2766 Douglas Road
Miami, Florida 33133
Telephone: (305) 445-5320
(Counsel for Petitioner)

Appendix

Gerald John RUSSELL,

Appellant,

v.

The STATE of Florida,

Appellee.

No. 82-1663

District Court of Appeal of Florida,
Third District.

Aug. 9, 1983.

Rehearing Denied Sept. 21, 1983.

Appeal from Circuit Court, Dade County; Joseph P. Farina, Judge.

Joel Hirschhorn, Miami, for appellant.

Jim Smith, Atty. Gen., and Penny Hershoff Brill, Asst. Atty. Gen., for appellee.

Before HENDRY, NESBITT and BASKIN, JJ.

PER CURIAM.

Affirmed. *Breedlove v. State*, 413 So.2d 1 (Fla.), *cert. denied*, _____ U.S. _____, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982); *see also James v. State*, 334

So.2d 83 (Fla. 3d DCA 1976); *Zamot v. State*, 375 So.2d 881 (Fla. 3d DCA 1979); *Rose v. State*, 425 So.2d 521 (Fla. 1982); *Sireci v. State*, 399 So.2d 964 (Fla. 1981), *cert denied*, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982); *Forehand v. State*, 126 Fla. 464, 171 So. 241, 243 (1936); *Lecoin v. State*, 418 So.2d 336 (Fla. 3d DCA 1982).

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1983
WEDNESDAY, SEPTEMBER 21, 1983

CASE NO. 82-1663

GERALD JOHN RUSSELL,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Upon consideration, appellant's motion for rehearing is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By [Illegible]
Chief Deputy Clerk

cc: Joel Hirschhorn
Penny Hershoff Brill

AMENDMENT [VI.]

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV.

1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

782.04 Murder

(1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being; or

2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:

a. Trafficking offense prohibited by s. 893.135(1),

b. Arson,

c. Sexual battery,

d. Robbery,

e. Burglary,

f. Kidnapping,

g. Escape,

h. Aircraft piracy, or

i. Unlawful throwing, placing, or discharging of a destructive device or bomb; or

3. Which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,

is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment.

FILED FOR RECORD '82 MAR 17

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY FALL TERM, 1981
82-5815 (14)

STATE OF FLORIDA

vs.

GERALD RUSSELL,

DEFENDANT.

INDICTMENT

I. FIRST DEGREE MURDER
II. ATTEMPTED FIRST DEGREE MURDER

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 24th day of February, 1982, within the County of Dade, State of Florida, GERALD RUSSELL, did unlawfully and feloniously, from a premeditated design to effect the death of a human being, kill LANCE ANDERSON, a human being by shooting him with a firearm, to wit: A handgun, in violation of Florida Statutes 782.04 and 775.087, to the evil example of all others in like cases

offending and against the peace and dignity of the State of Florida.

COUNT II

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 24th day of February, 1982, within the County of Dade, State of Florida, GERALD RUSSELL, did unlawfully and feloniously attempt to commit a felony, to wit: Murder in the First Degree, upon FRANK ARMSTRONG, and in furtherance thereof, the defendant GERALD RUSSELL, with felonious intent and from a premeditated design to effect the death of a human being, attempted to kill FRANK ARMSTRONG, a human being, by shooting at him with a firearm, to wit: A handgun, in violation of Sections 782.04 (1), 777.04 (1), and 775.087 Florida Statutes, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

* * *

[1355-1359]

[Mr. KAHN PROSECUTOR] . . . why, because he left the bicycle in the front of the house. If he was planning to abduct him in the yard or kill him in the yard the way he did, he would not have left his bicycle in the yard and went through all these precautions, the changing of clothing, the ski mask—

MR. HIRSCHHORN: I hate to object. "Abduction" on the bicycle. I didn't argue "abduction."

MR. KAHN: Based upon your theory—

MR. HIRSCHHORN: Objection as to someone on the bicycle—we have not talked about abduction.

MR. KAHN: I changed the wording earlier. He is correct, Your Honor. I changed it earlier, Your Honor. To kill him when he arrived there.

MR. HIRSCHHORN: All right.

MR. KAHN: The bicycle in front of the house where it was seen. But he's there with the ski mask, gloves, so as not to leave fingerprints or to avoid getting the fiberglass on his arms. He needed to have his hands or his right sleeve inside this fiberglass box under this—as the defendant tells us on the stand, "It happened a year ago when I was test firing out in my backyard."

I think it might have been washed in a year, but we know he had his hand in there. He used the glove not to leave fingerprints or to get fibers on his hands.

The handcuff for abducting Lance Anderson to get him from the house, to take him away from the house.

MR. HIRSCHHORN: Excuse me, Judge. I object to this theory of abduction and the handcuffs that were found.

I mean, I never argued anything about abduction. I can't believe Counsel.

MR. KAHN: We are argued the handcuffs has significance as of the surgical gloves.

MR. HIRSCHHORN: The handcuffs were in the car, not found at the scene. If it had been at the scene, but it was found in the car.

THE COURT: I'm going to allow that in closing arguments.

Thank you.

MR. KAHN: Thank you.

What is the purpose of the handcuffs that he had just bought because he just wanted – he had just happened to put them in the truck to abduct Lance Anderson away from the scene of his lover, Kathy Anderson, who would have never known, would have been waiting and waiting. So, the gloves wouldn't leave fingerprints. And the money wrappers to leave in Lance Anderson's car.

He had no idea that the witness was with the victim in the car, no idea about Frank Armstrong. Remember that.

"I never expected a witness to be there."

Lance Anderson was coming home alone on a very dark, quiet street.

You look at the photographs very easily. The car is there. There was a car here (indicating). If you remember

the photograph of Tom Sloat's car before the house, right in front of it. There was already a car right in front of the house. There's the drive that goes off in a circle. He's here (indicating) and Lance Anderson comes. Before he gets out of the car he is abducted by a masked man and ordered back into the car and he is abducted and dumped somewhere, some canal. Handcuffed.

MR. HIRSCHHORN: Your Honor, I am going to object. He has gone way beyond our theory. There is no lesser included third degree murder in this case and Counsel is talking about abduction. We never had evidence like that.

Now, he is talking about a canal, talking about a canal.

THE COURT: I don't think there is any charge, just a theory by the State. There are no additional charges in that, just those as presented.

MR. HIRSCHHORN: It is unfair rebuttal because I was not given a chance to explain. Rebuttal should be limited to what I bring up.

MR. KAHN: Counsel asked for the relevancy of these materials, Your Honor, the surgical gloves, the handcuffs. I'm responding to questions asked me.

MR. HIRSCHHORN: I didn't ask concerning relevancy. There's nothing, apparently—

THE COURT: Overruled.

Thank you.

MR. KAHN: The money wrappers, the defense asked the significance of the money wrappers. He went so far to explain that the noise suppressor wasn't so good as one that would have been to suppress some of the noise.

Why the money wrappers?

To cover his tracks. You all heard testimony about the rich businessman, don't you love it? The money wrappers are in his vehicle where the body is. The motive is robbery, not love, robbery. He's gone. He's a free man. But – but, he got caught. He didn't have time to use the suppressor. He had time to get the mask and hold it down and that's about it.

[1366-1367]

MR. HIRSCHHORN: I move for a mistrial on the grounds that Mr. Kahn, I'm saying, was intentionally, intentionally raising issues that was not raised by pleadings nor the proof, nor which was raised in my closing argument. He made reference to abduction. He then made reference to the canal, dumping the gun in the canal. He made reference to a robbery, all of which is totally inconsistent and not even logical. There was a silencer down there. In addition, I do not known how anyone could abduct somebody on a bicycle.

THE COURT: Response?

MR. KAHN: My response argument is what relevancy of certain items were asked me about and I told about them.

THE COURT: I am denying the motion based upon the State's response.

MR. HIRSCHHORN: I'm going to request surrebuttal. Let me respond before you. I have a right under the law and I can bring my memorandum of law as soon as I call my office. I prepared one several years ago before they had it. Surrebuttal limited in there limited Florida Federal Court when the Court overrules an objection not brought in by the defendant in the middle of argument. I have been granted surrebuttal twice in 15 years of law.

[1367-1368]

MR. HIRSCHHORN: We submit that the State's bringing up abduction and robbery and also talking about a canal is bias and theoretical the significance of the handcuffs and money wrappers, which frankly does not make sense to me.

THE COURT: That's right.

[1370]

THE COURT: . . . . I believe that the defense lawyer's objection during the course of the rebuttal by the State is inference upon inference and on certain defenses not being made and the fact that no pleadings

were ever presented. These issues were not actually formed more or less and would say what the surrebuttal would be. And therefore, I am going to deny it and allow the Appellate Court to consider whether or not I was right or wrong in granting the motion for mistrial.

MR. HIRSCHHORN: In denying the motion for mistrial?

THE COURT: Yes.

* * * *

[1370]

MR. HIRSCHHORN: Your Honor, just to be consistent, we move to strike all argument made by Mr. Kahn relative to insanity. I would ask you to instruct the jury relative to the insanity and the abduction, robbery and canals.

THE COURT: As to what?

MR. HIRSCHHORN: No such crime's been committed.

[1371-1373]

MR. HIRSCHHORN: No, I'll amend that requested instruction. Any argument relative to abduction to commit a robbery.

THE COURT: What?

MR. HIRSCHHORN: Any of Mr. Kahn's argument that go on —

THE COURT: What do you want to me to say?

MR. HIRSCHHORN: Disregard any of Mr. Kahn's argument in which he said that the defendant intended to abduct for the purpose of, for possible purpose of robbing.

MR. KAHN: I never said that.

MR. HIRSCHHORN: Whatever it was, I hit the roof. Whatever you said, abduction for the purpose of robbing —

MR. KAHN: I didn't. I never said that. The only time I mentioned robbery was in regard to the money wrappers to make it appear like a robbery. I never said that. He's putting words in my mouth now. His intent might have been that, but he was never able to do it because they discovered him on the lawn.

MR. HIRSCHHORN: You said he wanted it to look like a robbery.

MR. KAHN: To make it look like a robbery.

MR. HIRSCHHORN: He is not charged with attempted abduction or attempted robbery.

THE COURT: No, that I can't believe that the jury would draw an inference that he committed those crimes but that he was laying there. That's a theory as to why he was there at the time.

MR. KAHN: Correct.

MR. HIRSCHHORN: Can I give one sentence? If you believe he was there to abduct him on his daughter's bike then you can vote him guilty of first degree murder.

THE COURT: They are not going to think that. I'm just telling you I'm going to stand on the motion and my ruling.

MR. HIRSCHHORN: I assume my request is denied?

THE COURT: Yes.